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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 723

DOUGLAS ROSE, ANDREW MCLEAN, DAVID SAMUEL PULLEY, et al.,

Petitioners

v.

HARRIETT COTTON MILLS AND HENDERSON COTTON MILLS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

DOUGLAS ROSE, ANDREW MEDLIN, DAVID SAMBO PULLEY, et al.,

Petitioners

v.

HARRIETT COTTON MILLS AND HENDERSON COTTON MILLS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

There are five separate records included in this petition. Reference to each record is designated as follows:

DR—Douglas Rose Record (No. 385 below).
AM—Andrew Medlin Record (No. 386 below).
Pulley—David Sambo Pulley Record (No. 388 below).
Pegram—Calvin Pegram Record (No. 390 below)
LN—Linvel Nelson Record (No. 391 below).

Douglas Rose, Leonard Barham, Charlie C. Harris, Dorsey Eatman and Wayne Vick in (No. 385 below), Luke Hamm, Leonard Barham, Carl Neal, Bennie Edwards, Hilton Parrish and Andrew Medlin in (No. 386 below), David Samuel Pulley and William Choplin in (No. 388 below), Calvin Pegram in (No. 390 below), and Linvel Nelson in (No. 391 below) pray that writ of certiorari issue to review the judgments of the Supreme Court of

North Carolina affirming judgments of the Superior Court of Vance County finding petitioners in contempt of court and imposing sentences of fine and imprisonment for alleged contempt of a temporary restraining order issued without notice in a labor dispute.

Copies of judgments of Superior Court of Vance County, North Carolina, and decisions and judgments of Supreme Court of North Carolina are included in Appendix filed herewith. Copy of portion of brief filed by petitioners on appeal to Supreme Court of North Carolina is filed as Exhibit.

Opinions Below

The opinions of the Supreme Court of North Carolina appear as follows:

No. Below	Citation	Record
385	251 N.C. 218, 111 S.E. 2d 457	DR R. p. 201
386	251 N.C. 231, 111 S.E. 2d 465	AM R. p. 138
388	251 N.C. 248, 111 S.E. 2d 467	Pulley R. p. 85
390	251 N.C. 254, 111 S.E. 2d 480	Pegram R. p. 53
391	251 N.C. 335, 111 S.E. 2d 484	LN R. p. 81

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3). The decisions of the Supreme Court of North Carolina were rendered and final judgments were entered on the following dates: DR (No. 385 below), AM (No. 386 below), Pulley (No. 388 below), and Pegram (No. 390 below) on November 25, 1959; LN (No. 391 below) on December 2, 1959. Stays of execution were granted by the Supreme Court of North Carolina by orders entered on December 7, 1959, providing for stays of execution on the judgments pending the filing by petitioners of petitions for certiorari in this Court within the time prescribed by law and the disposition made thereof, and further providing that petitioners remain at

liberty under bond pending the final determination of these actions.

The petitioners contend that in the contempt proceedings in the Superior Court of Vance County, North Caroline, wherein each of the petitioners was found guilty of contempt of court for alleged violation of a labor dispute restraining order resulting in sentences of fine and imprisonment, petitioners were denied due process of law in violation of the due process clause of the Fourteenth Amendment for the reason that in these contempt proceedings, which were based on alleged acts committed out of the presence of the court, the findings of guilty and judgment of the trial court as to each petitioner were predicated upon *ex parte* affidavits of various persons and the petitioners were denied the right of confrontation of witnesses against them. This contention was urged in the Supreme Court of North Carolina, both in the written briefs and arguments of the cases in that Court. The decisions below as to whether or not petitioners were denied due process of law are, therefore, reviewable by writ of certiorari under 28 U. S. C. 1257 (3).

The jurisdiction of the Court more fully appears from the statement and reasons for granting the writ.

Question Presented

Whether a defendant in a State Court proceeding for alleged violation of a labor dispute temporary restraining order waives his right under the due process clause of the Fourteenth Amendment to confrontation of witnesses against him by failing specifically to demand at the hearing of the matter that the witnesses against him be brought into court in order that he might be confronted with and cross-examine them, and the trial court proceeds to findings of guilty and imposition of sentence based on *ex parte* affidavits of such witnesses.

Constitutional Provisions Involved

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Fourteenth Amendment to the Constitution of the United States*, United States Code, 1958 Edition, Page XLVII.

Statement

Textile Workers Union of America (AFL-CIO), a labor organization representing respondents' employees engaged in a strike at the respondents' plants in Henderson, North Carolina, beginning on November 15, 1958. Local Union No. 578, Textile Workers Union of America (AFL-CIO) is the Local Union of employees of the respondent Harriet Cotton Mills, and Local Union No. 584, Textile Workers Union of America (AFL-CIO) is the Local Union of employees of the respondent Henderson Cotton Mills. Respondents did not attempt to operate their plants until early February of 1959. On February 13, 1959, each of the respondents instituted action in the Superior Court of Vance County against the Textile Workers Union of America (AFL-CIO) and the Local Unions representing the employees of their respective plants as well as certain named individuals, in which actions the respondents asserted inadequate legal remedies and requested injunctive relief against certain alleged conduct on the part of the defendants named in the respective actions consisting of acts designed to interfere with the operation of respondents' plants. DR R. p. 19, AM R. p. 19, Pulley R. p. 19, Pegram R. p. 16, LN R. p.

16. On the same day, February 13, 1959, there was issued without notice to the defendants a temporary restraining order prohibiting and regulating certain anticipated activities of the defendants named therein and "all other persons to whom notice and knowledge of this action may come". DR R. p. 30, AM R. p. 29, Pulley R. p. 30, Pegram R. p. 23, LN R. p. 25.

The petitioners Douglas Rose, Charlie C. Harris, Dorsey Eatman, Carl Neal, Bennie Edwards, Hilton Parrish, Andrew Medlin, David Samuel (Sambo) Pulley, William Choplin and Linvel Nelson were named as defendants in the respondents' original actions and in the temporary restraining order, and copies of the summons and complaint and temporary restraining order were served on them by the Sheriff of Vance County. DR R. p. 40, AM R. p. 42, Pulley R. p. 44, LN R. p. 34. The petitioners Leonard Barham, Wayne Vick, Luke Hamm and Calvin Pegram were not named as defendants in either the original actions or in the temporary restraining order and were not served with either the summons and complaint or temporary restraining order.

Thereafter, show cause orders issuing from the Superior Court of Vance County, North Carolina, together with the affidavits of various persons were served on the petitioners ordering them to appear at the time stated in the order pertaining to each petitioner, and show cause why he should not be adjudged in contempt of court for acts alleged to have been committed in violation of the temporary restraining order. DR R. p. 50, AM R. p. 45, Pulley R. p. 52, Pegram R. p. 36, LN R. p. 42. Answers were filed by the petitioners denying the contumacious acts alleged and denying violation of the temporary restraining order. DR R. p. 53, AM R. p. 57, Pulley R. p. 54, Pegram R. p. 38, LN R. p. 44. When the hearings in the various contempt proceedings were held, the respondents (plaintiffs in trial court) in each case intro-

duced into evidence the original complaint with sheriff's return as to service thereof, the temporary restraining order with sheriff's return as to service thereof, the order making the temporary restraining order permanent, the motion or petition for show cause order with affidavits attached, and the order to show cause with sheriff's return as to service thereof. DR R. p. 58, AM R. p. 65, Pulley R. p. 56, Pegram R. p. 39, LN R. p. 46. This, and particularly the *ex parte* affidavits of various persons which were received into evidence to prove the alleged contumacious acts of the petitioners, constituted the entire evidence offered by the respondents (plaintiffs in trial court), DR R. pp. 58-59, AM R. pp. 67-78, Pulley R. pp. 56-62, Pegram R. pp. 39-42, LN R. pp. 46-50, except that in addition to the above mentioned, two witnesses in the case of Local Union No. 578, *Luke Hamm, et al.*, v. *Harriet Cotton Mills*, (No. 386 below) and one witness in the case of Local Union No. 578, *David Samuel Pulley, et al.*, v. *Harriet Cotton Mills*, (No. 388 below) testified at the hearings in those cases and were cross-examined by petitioners. Petitioners made no specific request to the trial court at the hearing of these cases for the granting of their right to be confronted with the witnesses against them, but did request and receive permission to present their own evidence by oral testimony. The petitioners did contend on appeal to the Supreme Court of North Carolina that the judgments holding them in contempt should be reversed because the affidavits offered to support the findings of fact were incompetent and should have been rejected by the trial court *sua sponte* since proof by that manner constituted a denial of due process guaranteed by both State and Federal Constitutions, and that since the conduct amounted to criminal contempt proof of the charges by the affidavits deprived petitioners of confrontation and cross-examination, rights guaranteed by both State and Federal Constitutions.

The Supreme Court of North Carolina held that ". . . the 'law of the land' guaranteed by Article I, Section 17 of our Constitution, synonymous with due process of law (under the Fourteenth Amendment to the Constitution of the United States), guarantees to one charged with contempt of court by an asserted willful violation of a restraining order a right, when he denies the asserted violation, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established."; but that "If appellants wished to challenge the evidence offered for the purpose of establishing their guilt, they should have objected when the evidence was offered", and that petitioners waived their right to confrontation by failing to make a timely assertion of the right. *Cotton Mills* v. *Local 578, et al.*, 251 NC 218, 111 S.E. 2d 457, DR R. p. 201.

Since the question as to denial of due process of law was identical in all of the cases, the Supreme Court of North Carolina did not discuss this question in detail in any of the cases other than *Cotton Mills* v. *Local 578, et al.*, *supra*, but referred to the opinion in that case as authority for affirming the findings of guilty and sentences imposed in the other cases.

Reasons for Granting the Writ

The question in these cases raises a substantial federal question which has been decided adversely to the petitioners in the North Carolina Supreme Court and is a question not heretofore passed upon by this Court.

Not only is a determination of the constitutional right as to confrontation by witnesses against them of immediate vital importance to petitioners, who were charged with and convicted of contempt of court for alleged violation of a temporary restraining order by acts committed out of the presence of the court, but such a determination by this Court would clarify one other aspect

of federal constitutional rights under the Fourteenth Amendment as it pertains to state court proceedings for contempt which, because of the varied procedures, practices and denomination of contempts in the various state courts, litigants, their attorneys, and the courts in such proceedings are often left in confusion as to the nature and extent of such rights. And the declaration and clarification of such rights is needed because what was at one time the extraordinary writ of injunction has in recent years become, in some state courts, a commonplace process for the attempted resolution of labor disputes. Unfortunately, in such disputes, unjustifiable violence on the part of both pro-union and anti-union forces sometimes occurs. No contention is made here, nor was such contention made in the state courts, that persons guilty of offenses against the laws of the state should not be punished for such violations. It is felt that the better practice would be to treat such violations simply as criminal offenses with trial in the criminal courts, and that proceedings for injunctive relief in such situations is of doubtful wisdom since experience has indicated that such proceedings, instituted at the instance of management and confined to alleged acts of violence on the part of pro-union forces, leaves the impression with some persons that the state and its courts have "taken sides" and serves to further charge an already electrified situation. However, such injunctive proceedings are recognized and when restraining orders are issued, they must be obeyed. The power of courts to compel obedience to their orders lawfully issued is essential to the jurisdiction and maintenance of judicial authority. *Manufacturing Co.* v. *Arnold*, 228 N.C. 375, 45 S.E. 2d 368.

Although the petitioners in these cases have, at every stage of the cases, protested their innocence of the contemptuous acts charged, the only question this Court may properly be asked to consider is whether or not the procedures followed in the trial court violated the petitioners'

right to confrontation of witnesses guaranteed by the Fourteenth Amendment.

The Supreme Court of North Carolina, in accordance with the decision of this Court in the case of *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682, held that due process of law "guarantees to one charged with contempt of court by an asserted willful violation of a restraining order a right, when he denies the asserted violation, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established.". *Cotton Mills v. Local 578, et al., supra,* DR R. p. 201. Hence, this Court will not be burdened by an extended discussion of this point.

However, the Supreme Court of North Carolina held that petitioners have waived this right by failing to make an objection to the *ex parte* affidavits offered for the purpose of establishing their guilt at the times such affidavits were offered. *Cotton Mills v. Local 578, et al., supra.*

Petitioners do not contend that a constitutional right cannot, under some circumstances, be waived. Cases holding lack of jurisdiction to review or procedural waiver of such rights may be classified as follows:

(1) Where the defendant has failed to take advantage of definitely prescribed procedures established to provide an opportunity to challenge the action in question. *Yakus v. United States*, 331 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (Justices Rutledge, Roberts and Murphy dissenting); *Michel v. State of Louisiana*, 350 U.S. 91, 76 S. Ct. 158, 100 L. Ed. 83 (Mr. Justice Douglas, with whom the Chief Justice and Mr. Justice Black concurred, dissenting).

(2) Where there is such a failure to comply with the rules of this Court that no federal question is presented on appeal. *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86, 53 S. Ct. 32, 77 L. Ed. 180, 86 A.L.R. 174.

(3) Where there is no showing that a federal question constituting an appropriate ground for review was presented in and expressly or necessarily decided by the state court. *Whitney* v. *People of California*, 274 U.S. 357, 47 S. Ct. 641, 643, 71 L. Ed. 1095; *Barbour* v. *State of Georgia*, 249 U.S. 454, 39 S. Ct. 316, 317, 63 L. Ed. 704 (holding that a federal question, first raised by defendant in an amended motion for new trial, which could not be considered by the state court under the state practice, does not present the question to the Supreme Court on writ of error); *O'Neil* v. *State of Vermont*, 144 U.S. 323, 12 S. Ct. 693, 696, 36 L. Ed. 450 (Justices Field, Harlan and Brewer dissenting).

The right to confront and cross-examine witnesses against him may, under certain circumstances, be waived by a defendant. The cases so holding may be classified as follows:

(1) Where the party who asserts that he has been deprived of the right of confrontation and cross-examination has, himself, offered the incompetent matter into evidence. *Diaz* v. *United States*, 223 U.S. 442, 32 S. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138; *Connecticut Mutual L. Ins. Co.* v. *Hillmon*, 188 U.S. 208, 235 S. Ct. 294, 47 L. Ed. 446.

(2) Where the defendant or his counsel enters into a stipulation as to what absent witnesses would testify if present. *Diaz* v. *United States*, *supra*, 32 S. Ct. at page 252, and cases cited; *Fukunaga* v. *Territory of Hawaii*, C.C.A. 9th Circuit, 33 Fed. (2d) 396, cert. den., 280 U.S. 594, 74 L. Ed. 641.

(3) Where the defendant pleads guilty. *People ex rel Kennedy* v. *Hunt*, 13 N.Y.S. 2d 816, 257 App. Div. 1039.

(4) Where, in certain cases, accused voluntarily absents himself after trial has begun. *Diaz* v. *United States*, *supra*, 32 S. Ct., at page 254, and cases cited; *United States* v. *Barracota*, D.C.N.Y., 45 F. Supp. 38.

(5) Where a prosecution witness is absent because of the wrongful procurement of such absence by the accused, other evidence is admissible. *Reynolds* v. *United States*, 98 U.S. 145, 158, 25 L. Ed. 244, 247.

It appears clearly that none of the foregoing situations apply to the present cases.

The petitioners contend that no waiver of their constitutional right to confrontation occurred by their failure specifically to request at the trial that they be granted such right since a mere failure to assert such a fundamental right cannot be considered as a waiver of it. Contempt proceedings are governed by the ordinary rules as to admissibility of evidence. 17 C.J.S., page 111, Contempt, section 84C. At 17 C.J.S., page 112, it is stated that ". . . it has been held that a conviction for contempt based on affidavit is not a deprivation of defendant's privilege to meet his witnesses face to face (citing *O'Neil* v. *People*, 113 Ill. App. 195; *Bowden* v. *Bowden*, 198 Tenn. 143, 278 S.W. 2d 670), and that affidavits on which a warrant is issued in contempt proceedings are admissible in evidence on the hearing (*Ex parte Wenzler*, 74 P. 2d 297; *State* v. *Harris*, 14 N.D. 501; 105 N.W. 621; and *Warner* v. *Martin*, 124 Ga. 387, 52 S.E. 446, 4 Am. Cas. 480)". These cases are either distinguishable from the present cases or are in conflict with the decision of this Court in the case of *In re Oliver, supra.*

In the *Bowden* case, *supra*, 198 Tenn. 143, 278 S.W. 2d 670, the prosecuting witness was present in court and the Chancellor informed the defendant that he could cross-examine the complainant under oath if he so desired. In *Ex parte Wenzler, supra*, 74 P. 2d 297, there is no intimation that the use of affidavits was ever challenged by the defendant in either the trial or appellate court, but merely that there was a failure to show facts sufficient to constitute a contempt.

The holding in *Warner* v. *Martin*, *supra*, 124 Ga. 387, 52 S.E. 446, 4 Am. Cas. 180, that ex parte affidavits are admissible, even over objection, would not only be in conflict with the decision of the North Carolina Supreme Court on this point, but would certainly not comply with due process as to right of cross-examination declared by this Court in the case of *In re Oliver*, *supra*.

The cases of *O'Neil* v. *People*, *supra*; 113 Ill. App. 195, and *State* v. *Harris*, *supra*, 14 N.D. 501, 105 N.W. 621, would also be in conflict with the *Oliver* case insofar as they hold that the defendant is not entitled to confrontation and cross-examination of witnesses against him.

Furthermore, it is also stated in 17 C.J.S., page 112, ". . . that where a conviction for contempt might subject defendant to imprisonment, he should be tried, not on ex parte affidavits, but on oral testimony, whether the contempt is civil or criminal.", and note 88 thereunder. See also 43 C.J., page 76, note 72.

In the case of *Hotaling* v. *Superior Court*, 199 Cal. 501, 217 P. 73 at page 75, 29 A.L.R. 127, it is held that in a prosecution for constructive contempt, the affidavits on which the citation is issued constitute the complaint. The affidavits of the defendant constitute the answer or plea. The issues of fact as formed by the respective affidavits serve as pleadings. *A hearing must be held on these issues at which competent evidence must be produced* (emphasis supplied).

The North Carolina Supreme Court has previously held that the show cause order in contempt proceedings, supported by the plaintiff's affidavits, constitutes the minimum *accusatory* requirements of due process under the North Carolina statute as to contempts. *Gaylon* v. *Stutts*, 241 N.C. 120, 84 S.E. 2d 822, N.C. G.S. 5-7. The petitioners contended in the Supreme Court of North Carolina and now contend that the show cause order and sup-

porting affidavits serve no purpose other than to satisfy the accusatory requirements of due process, the same as would be accomplished by a warrant or bill of indictment—that is, to bring the petitioners within the jurisdiction of the court and apprize them of the wrong they are alleged to have committed—and that such affidavits could not be considered as competent proof of the facts constituting the alleged contempt. *Hotaling* v. *Superior Court, supra*, 191 Cal. 501, 217 P. 73; *Staley* v. *South Jersey Realty Co.*, 83 N.J. Eq. 300, 90 A. 1042, Am. Cas. 1916B, page 955.

The *Staley* case is factually very similar to the present cases insofar as the question of the competency of the affidavits is concerned. There, as in these cases, the court proceeded to findings of guilty on *ex parte* affidavits without any indication, from the decision, that the counsel for defendant made any request that plaintiff's evidence be presented by oral testimony, and the defendant, as in these cases, introduced no affidavits in his own behalf. The court said, at 90 A. 1045, "The defendant is not to be held responsible for the manner in which the case against him was conducted; his counsel waived nothing and acquiesced in nothing except as to the adverse ruling of the court on his motion for a continuance. If the incriminating witnesses had been sworn and examined as they should have been, he was there to cross-examine them or to lay the ground for their contradiction or impeachment. The *ex parte* affidavits, if known to the defendant, were not recognized by him as legal evidence; answering affidavits were not filed, hence the defendant did not even apparently acquiesce in that method of trial. We can reach therefore but one conclusion, and that is that the order sentencing the defendant to a definite term of imprisonment for a criminal contempt was made without any evidence of his guilt that was admissible in such a proceeding.".

The petitioners contend that, as was held in the *Staley* case, the effect of their trial is that they have been convicted and sentenced to a definite term of imprisonment for a criminal contempt without any evidence of their guilt that was legally admissible in such a proceeding.

Furthermore, the petitioners probably could not have waived the right to confrontation in this criminal proceeding, even had they affirmatively desired to do so, without the consent of the court, under the prior decisions of the North Carolina Supreme Court. *Cotton Mills* v. *Local 578, et al., supra*, DR R. p. 201, the court states: "'In this jurisdiction the important privilege of being present in person, so as to confront one's accusers on trial for a criminal offense, may, in felonies other than capital, be waived by the defendant himself, but not by his counsel, while in misdemeanors such waiver may be made by his counsel *with the consent of the court*'. *State* v. *Hartsfield*, 188 N.C. 357, 124 S.E. 629; *State* v. *Grundler, ante*, 177; *Cameron* v. *McDonald*, 216 N.C. 712, 6 S.E. 2d 479; *State* v. *Harris*, 181 N.C. 600, 107 S.E. 466; *State* v. *Mitchell, supra*; *Miller* v. *State*, 237 N.C. 29, cert. den., 345 U.S. 930, 97 L. Ed. 1360".

Waiver of constitutional rights should not be lightly inferred, and courts should indulge every reasonable presumption against waiver of fundamental constitutional rights. *Emspak* v. *United States*, 349 U.S. 190, 75 S. Ct. 687, 99 L. Ed. 997.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully, submitted,

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Petitioners' Exhibit

Portion of appellants' brief on appeal to Supreme Court of North Carolina pertaining to question of denial of due process:

ARGUMENT

II.

THAT THE RESPONDENTS WERE DENIED DUE PROCESS OF LAW BY REASON OF THE FACT THAT THEY WERE DENIED THE OPPORTUNITY TO FACE AND CROSS-EXAMINE THEIR ACCUSERS.

RESPONDENTS' EXCEPTION NO. 3

Preliminary to the discussion of the particular issue involved in this question, it is perhaps appropriate to refer to and quote at length from the very thorough and excellent summarization and classification of the various types and aspects of contempt made by Johnson, J. in the case of *Haylon* v. *Stutts*, 241 N.C. 120 (Beginning at 123), 84 S.E. 2d 822: "Contempts of court are classified in two main divisions, namely, direct or indirect, the test being whether the contempt is perpertrated within or without the presence of the court. A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session (*State* v. *Woodfin*, 27 N.C. 199; *State* v. *Nowell*, 156 N.C. 648, 72 S.E. 590), or during recess (Ex parte *McCown*, 139 N.C. 95, 51 S.E. 957; *State* v. *Little*, 175 N.C. 743, 94 S.E. 680) which tend to subvert or prevent justice. An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent or impede the administration of justice. In re *Parker*, 177 N.C. 463,

99 S.E. 342; *Snow* v. *Hawkes*, 183 N.C. 365, 111 S.E. 62. See also 12 Am. Jur., Contempt, section 4; 17 C.J.S., Contempt, sections 3 and 4.

"Proceedings for contempt are of two classes, criminal and civil. Criminal proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders. Civil proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. Criminal proceedings, involving as they do offenses against the courts and organized society, are punitive in their nature, and the government, the courts, and the people are interested in their prosecution. Whereas civil proceedings, having as their underlying purpose the preservation of private rights, are primarily remedial and coercive in their nature, and are usually prosecuted at the instance of an aggrieved suitor. 12 Am. Jur., Contempt, section 6.

"With us contempts are defined and classified by two statutes; G.S. 5-1 and G.S. 5-8. These statutes recognize and preserve the fundamental distinction between civil and criminal contempt in substance but not in name. Acts or omissions which ordinarily constitute criminal contempt as defined in the textbooks are designated by our statute (G.S. 5-1) as punishable 'for contempt', without further designation; the acts or omissions which ordinarily constitute civil contempt as defined in the books are designated by our statute (G.S. 5-8) as punishable 'as for contempt'. Thus, under our statutes the proceedings for criminal and civil contempt are 'for contempt' and 'as for contempt', respectively.

"A person guilty of any of the acts or omissions enumerated in the eight subsections of GS 5-1 may be punished *for contempt*, because such acts or omissions have a direct tendency to interrupt the proceedings of the court

or to impair the respect due to its authority. Whereas a person guilty of any of the acts or omissions described in the seven subsections of GS 5-8 is punishable *as for contempt*, because such acts or omissions tend to defeat, impair, impede or prejudice the rights or remedies of a party to an action pending in court. *Luther* v. *Luther*, 234 N.C. 429, 67 S.E. 2d 345. . . . . .

"G.S. 5-5 deals with direct contempt. It provides that 'contempt committed in the immediate presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every commital, attachment or process in the nature of an execution founded on such judgment or order'.

"G.S. 5-7 deals with indirect contempt. It provides that 'when the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. . . .'.

"G.S. 5-9 provides: 'Proceedings *as for contempt* shall be by an order directing the offender to appear within a reasonable time and show cause why he should not be attached for contempt'. (Italics added)".

A proceeding for contempt for an alleged willful violation of a restraining order, as in this case, is based upon G.S. 5-1, (*Manufacturing Co.* v. *Bonano*, 242 N.C. 587 and 590, 89 S.E. 2d 116 and 115; *Manufacturing Co.* v. *Arnold*, 228 N.C. 375, 45 S.E. 2d 368) and would be a proceeding for direct contempt. *Haylon* v. *Stutts*, *supra*. If found guilty, a respondent may be punished by fine, imprisonment, or both. G.S. 5-4.

Appeal from a judgment of guilty of indirect contempt for acts committed out of the presence of the court is in

the same manner as is provided for appeals in criminal actions. G.S. 5-2.

But even though a contempt proceeding is criminal in nature (*Gaylon* v. *Stutts, supra; Manufacturing Co.* v. *Arnold, supra;* In re *Hege*, 205 N.C. 625, 172 S.E. 345; In re *Gorham*, 129 N.C. 481, 49 S.E. 311), the proceeding is not governed by rules of procedure and the law applicable to criminal prosecutions. *Manufacturing Co.* v. *Arnold, supra.* Thus it has been held that respondent is not entitled to a jury trial. *Manufacturing Co.* v. *Arnold, supra;* In re *Gorham, supra.* Furthermore, it is not necessary that a respondent was a party to the original proceeding in which the restraining order was issued or that he was formally served with a copy of the order he was charged with violating, it being sufficient if it is shown that he actually "knew that such order had been issued and knew the contents thereof at the time the prescribed acts alleged were committed. *Erwin Mills* v. *Textile Workers Union*, 234 N.C. 321; 67 S.E. 2d 372; *Hart Cotton Mills, Inc.* v. *Abrams*, 231 N.C. 431, 57 S.E. 2d 803.

The decisions from other jurisdictions are generally in accord with the holdings from this jurisdiction on the question of the lack of right to jury trial in a contempt proceeding and that a respondent may be punished without actually having been a party to the original proceeding, and no criticism is made of these holdings. The power of courts to compel obedience to their orders lawfully issued is essential to their jurisdiction and the maintenance of judicial authority. *Manufacturing Co.* v. *Arnold, supra.*

However, the respondents contend, and believe the court will agree, that proceedings designed to maintain and preserve the dignity of the courts and compel obedience to their orders can and must be consistent with certain basic and fundamental rights essential to due process. Furthermore, the respondents contend that the right to confront and cross-examine their accusers and other wit-

nesses against them is essential to due process. Art. I, section 17, of the Constitution of the State of North Carolina provides: "No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land."

The "law of the land" is equivalent to "due process of law". *State* v. *Collins*, 169 N.C. 323, 84 S.E. 1049; *State* v. *Ballance*, 229 N.C. 764, 51 S.E. 2d 731.

The term "law of the land" means the general law, the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means the regular course of the administration of justice through the courts of competent jurisdiction; after the manner of such courts. Procedure must be consistent with the fundamental principles of liberty and justice. *State* v. *Chesson*, 228 N.C. 259, 45 S.E. 2d 563; *Eason* v. *Spence*, 232 N.C. 579, 61 S.E. 2d 717.

In *State* v. *Ballance*, *supra*, beginning at page 768, is found the very eloquent discussion by *Ervin, J.*, of the historical and fundamental significance attached to Art. I, section 17, of our Constitution, as well as to section 29 of Art. I containing the solemn warning that "A frequent recurrence to fundamental principles is also necessary to preserve the blessings of liberty."

Art. I, section 11, of our Constitution provides: "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty. (Const. 1868; 1945, C-634, s.1)."

In *State* v. *Hightower*, 187 N.C. 300, *Stacy, J.*, speaking for the Court, says: "Again, it is urged that the errors assigned by the defendant are technical, minute and attenuated, but we do not so understand the record. 'A fair and full cross-examination of a witness upon the subject of his examination-in-chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of the right is prejudicial and fatal error.' *Sanborn, J.*, in *Mining Company* v. *Mining Company*, 129 Fed. 668. In all criminal prosecutions the defendant is clothed with a constitutional right of confrontation, and this may not be taken away any more by denying him the right to cross-examine the State's witnesses than by refusing him the right to confront his accusers and witnesses with other testimony. *Constitution*, Art. I, sec. 11. 'We take it that the word 'confront' does not simply secure to the accused the privilege of examining witnesses in his own behalf, but is an affirmance of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face.' *Pearson, C.J.* in *S.* v. *Thomas*, 64 N.C. 74. And, of course, includes the right of cross-examination. It is fundamental with us, and expressly vouchsafed in the bill of rights, that no man shall be 'deprived of his life, liberty, or property but by the law of the land'. *Constitution*, Art. I, sec. 17."

It might be argued that since, in contempt proceedings, the respondent is not entitled to trial by jury, the provisions as to confrontation and cross-examination guaranteed by Art. I, section 11, of our Constitution, are not available to him. However, such an argument would be construing the decisions too narrowly. Confrontation in criminal actions includes both the right to be confronted "before the jury" as well as the right of the defendant to cross-examine the witnesses against him.

And while it has been stated that the provisions as to confrontation do not apply in civil actions, what was really held was that in civil actions the party does not have the right to be confronted "before the jury", and "in such cases, it sufficiently complies with the constitutional mandate if the testimony was taken under oath in the manner prescribed by law, *with opportunity to cross-examine.*" (Emphasis added). *Chesson* v. *Container Co.*, 223 N.C. 379, 26 S.E. 2d 904.

Insofar as can be determined, there are no decision from this jurisdiction directly pertaining to the competency of affidavits in a proceeding for indirect contempt to prove the facts constituting the alleged contempt, although it is admitted that apparently it has been the practice in this State to use affidavits as proof of the things done or omitted constituting the contempt. This practice apparently has resulted through misinterpretation of G.S. 5-7, which provides: "When the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order the person charged with contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter."

The cases uniformly hold that a proceeding for indirect contempt is always *based* upon affidavits or other verified pleadings setting forth facts constituting the alleged contempt, and that such affidavits or other verified allegations are required as the basis for an order to show cause. *Erwin Mills* v. *Textile Workers Union*, *supra*, and cases cited therein.

G.S. 5-7 requiring that a contempt proceeding be initiated by the issuance of a show cause order sets forth

the minimum *accusatory* requirements of due process (*Gaylon* v. *Stutts*, *supra*), and the respondents contend that this is all that G.S. 5-7 pertains to, and that the show cause order and supporting affidavits are analogous to indictments or warrants in a criminal prosecution and are limited to the purpose served by a bill of indictment or warrant; that is, to bring the accused within jurisdiction of the court and apprize him of the wrong he is alleged to have committed. The respondents further contend that the show cause order and the supporting affidavits are nothing more than accusatory in nature and cannot, consistent with due process, be considered as proof of the wrongful acts alleged. The respondents contend that should the show cause order and its supporting affidavits be considered not only as complying with the *accusatory* requirements of due process under G.S. 5-7, but also as *proof* of the wrongful acts they are alleged to have committed, they would be subject to a law which does not hear before it condemns; which proceeds without inquiry, and renders judgment without trial. And if such procedure is permitted, the respondents' basic rights under Art. I, sections 11 and 17, would be violated. Furthermore, such a proceeding would be violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In the case of In re *Oliver*, 333 U.S. 257, 68 S. Ct. 499, it is held that in a state court proceeding for indirect contempt for acts committed outside the presence of the court, "failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing, was a denial of due process. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include as a minimum, *a right to examine the witnesses against him*, to offer

testimony, and to be represented by counsel." (emphasis added).

For a collection of the decisions pertaining to the holdings of the United States Supreme Court relative to direct contempt and indirect contempt, see *Constitution of the United States, Annotated*, Corwin, 1953, beginning at page 1129.

The respondents therefore respectfully contend that in this proceeding they were denied the rights secured to them by Art. 1, sections 11 and 17 of the Constitution of the State of North Carolina, and were denied due process of law under the Fourteenth Amendment to the Constitution of the United States. The respondents further urge the Court to declare that in addition to the accusatory due process requirements of G.S. 5-7, as set forth in the case of *Gaylon v. Stutts, supra*, it is the law of this State that a person charged with indirect contempt for alleged acts committed out of the presence of the court is entitled to be confronted with and cross-examine his accuser and other witnesses against him, in accordance with the fundamental principles of justice and the law of the land.